

Beyond Legal Relations Wesley Newcomb Hohfeld's Influence on American Institutionalism

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Abstract - This paper documents Hohfeld's influence on interwar American institutionalism. We will mainly focus on three leading figures of the movement: John Rogers Commons, Robert Lee Hale, and John Maurice Clark. They regarded Hohfeld's contribution on jural relations as a preliminary step toward the understanding of the adversarial nature of legal rights. Albeit with substantial differences in style, method and emphasis, Hohfeld's schema provided a powerful analytical and rhetorical tool for their analysis.

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The issue

Joseph Dorfman once observed that “[Institutionalism] it is not economics in the usual sense, but a slice of the whole development of civilization of the United States since the end of the civil war” (Dorfman 1963, 8). In a quite similar fashion, some contemporary interpreters (Rutherford 2004; Asso and Fiorito 2008) have observed that American interwar institutionalism expressed more an intellectual mood than a clear body of tenets, more a set of general beliefs than a rigorous set of methodologies or propositions about economic theory. Institutionalism was primarily a sociological entity, with an inherently heterogeneous membership, and characterized by a series of loosely related research programmes. Some of these programmes overlapped or complemented each other; some diverged or even conflicted; some others were intrinsically connected to a specific academic center or research institution. Not a few of these research programmes, finally, showed the clear influence of other fields of inquiry. This was one of the distinguishing marks of the movement since its beginnings. Given its character of an “open paradigm,” so to speak, institutionalism was in fact particularly permeable to contaminations stemming from sociology, philosophy, psychology and other cognate disciplines. As far as the institutionalist research agenda on law and economics is concerned Malcolm Rutherford (2000, 297) has pointed out that “[t]here were close links between institutionalism and the realist approach to law.” Likewise, Barbara H. Fried has affirmed that the institutionalists’ general attention on the interrelation between legal and economic processes, “put them on an obvious path of convergence with the Realists and led them to similar conclusions: that there was and could be no such thing as *laissez faire*, since the state [...] was unavoidably constitutive of economic life; and that one should make a virtue out of a necessity, by turning the government into a positive force in the economy” (Fried 1998, 12).¹ According to Fried, it was the realists’ explicit recognition of law as a mechanism for implementing social control, combined with a clear preference for pragmatic, workable solutions over unanchored, abstract theorizing, that made Legal realism a natural “counterpart” of the institutionalist policy agenda of the 1920s and the 1930s. Interestingly, the somewhat parallel nature of the two movements is further substantiated by the fact that American institutionalists, in their analysis of the legal framework of economic activity, extensively drew and elaborated on the work of Yale Law professor Wesley Newcomb Hohfeld. Hohfeld is generally regarded as a forerunner of legal realism and there are certainly features of his work which tend to support this view. In two seminal articles published in 1913 and 1917, Hohfeld offered a more systematic and precise vocabulary to describe the range of functional relations created by legal rights. In so doing, as it will be argued in more detail below, Hohfeld contributed to reorient legal thought away from abstract notions of entitlement and toward the sort of pragmatic view of law as a social institution that was naturally more congenial to the institutionalists’ (and realists’) philosophical and epistemological commitments. Not surprisingly, therefore, leading institutionalists of the time regarded Hohfeld’s contribution – in spite of its analytical and formalistic style -- as a preliminary step toward the understanding of how law related to the changing economic conditions of the first decades of the last century.² The aim of this paper is to document and assess Hohfeld’s influence on interwar American institutionalism. Our analysis will mainly, although not exclusively, focus on three leading figures of the movement: John Rogers Commons, Robert Lee Hale, and John Maurice Clark. The paper is organized as follows: the first section presents Hohfeld’s model of jural relations; the second and third section discuss Commons’ adoption of Hohfeld’s model and its reframing into a transactional approach; the third section deals with Robert Lee Hale’s reading of Hohfeld; while the fourth section explains the Hohfeldian influence on John Maurice Clark; the fifth section offers a brief digression on some dissenting views on Hohfeld within institutionalism; the sixth section presents some conclusions.

¹ Other interpreters have called attention upon the link between institutionalism and American legal realism (Alexander 1997; Mercurio and Medema 1997; Schlegel 1995).

² Albeit particularly influential among institutionalists, Hohfeld was far from being the only figure proposing a vision of legal rights as a social creation. Other important sources of influence can be individuated in Roscoe Pound’s sociological jurisprudence, in the legal economics of Richard T. Ely, in the teachings of the German historical school, and in the legal realism of Karl Llewellyn.

Hohfeld's Jural Relations

In the second decade of the twentieth century, Hohfeld (1913, 1917) proposed a relational approach to rights and duties which has become one of the most influential and enduring works of American jurisprudence.³ In two celebrated essays published in the *Yale Law Journal* in 1913 and 1917, respectively, Hohfeld sought to remove the ambiguity and inadequacy of terminology surrounding the words "rights" and "duties".⁴ To provide greater clarity and precision in legal jargon, Hohfeld proposed a paradigmatic taxonomy that captures four different uses of word right: 1) right (in the Hohfeldian sense); 2) privilege, 3) power; and 4) immunity. He argued that a legal relation always involves two persons and that a right, privilege, power, or immunity is, by definition, linked to a correlative (duty, no-right, liability, and disability). Hohfeld displays the four relations in the following table of correlatives:

Jural Correlatives			
Right	Privilege	Power	Immunity
Duty	No-right	Liability	Disability

Table 1

A person with a Hohfeldian right against another person (who is under a duty) has a claim if the other does not act in accordance with the duty, while a person with a privilege may act without liability to another (who has a no-right). A person with a power is able to change a legal relation of another (who is under a liability). A person with an immunity cannot have a particular legal relation changed by another (who is under a disability).⁵ A few practical example may help to better illustrate each of Hohfeld's relations: 1) a party to a binding contract has a right to the other party's performance; 2) since flag burning is protected speech, a person has a privilege to burn a flag; 3) the state of Massachusetts has a power to call me to jury duty; 4) I have an immunity from being called to jury duty in Rhode Island. These examples are taken from Nyquist (2002, 240).

These legal concepts can also be arranged into a table of opposites. For instance, if a person has a privilege of performing an act vis-à-vis another person, it also implies that she/he does not have a duty to that person with respect to the act.

Jural Opposites			
Right	Privilege	Power	Immunity
No-right	Duty	Disability	Liability

Table 2

Some contemporary commentators (Simmonds 2001; Nyquist 2002), have pointed out that the two legal relations on the left side of Hohfeld's table of correlatives (right/duty and privilege/no-right) form a grid that focuses on a current state of affair, while the relations on the table's right side (power/liability and immunity/disability) form a second grid that describes both a current state of affairs and a potential future state. This distinction is strictly related to Hohfeld's own conception of power. In Hohfeld's words, a power exists where "a given legal relation may result [...] from some superadded fact or group of facts which are under the volitional control of one of more human beings." (Hohfeld 1913, 44).

³ For a full biography of Hohfeld see Wellman (2000).

⁴ In 1919, one year after Hohfeld's death, Yale University Press published the two articles as a small volume edited by Walter Wheeler Cook entitled *Fundamental Legal Conceptions, As Applied in Judicial Reasoning, and Other Legal Essays*. The volume included some of Hohfeld's intended changes to the original *Yale Law Journal* articles and reprinted Cook's article on "Hohfeld's Contributions to the Science of Law" (1919) as an introduction. The volume has been republished in 2001 with a new introduction by Nigel E. Simmonds.

⁵ The closest approximation to explicit definitions of the terms in Hohfeld's scheme can be found in the following passage: "A right is one's affirmative claim against another; and a privilege is one's freedom from the right or claim of another. Similarly, a power is one's affirmative 'control' over a given legal relation as against another; whereas an immunity is one's freedom from the legal power or 'control' of another as regards some legal relations." (Hohfeld 1913, 55).

As shown by our brief exposition, Hohfeld's analysis was phrased in purely analytical terms. This means that his dissection of different kinds of what he calls jural relations contains no direct or explicit policy implication. No wonder, therefore, that Hohfeld's status as a realist has risen some controversy. Legal historian John H. Schlegel, for instance, has argued that Hohfeld's analytic jurisprudence was precisely "the kind of abstraction that the Realists constantly complained of" (Schlegel 1993, 1067: quoted in Alexander 1997, 319). But this objection, we argue, misinterprets the original purpose of Hohfeld's critique of traditional legal jargon contained in his famous pair of articles. Interestingly, Hohfeld himself clarified his intent in the introductory passages of his 1913 article, affirming that "If [...] the title of this article suggests a merely philosophical inquiry as to the nature of law and legal relation, -- a discussion regarded more or less as an end in itself, -- the writer may be pardoned for repudiating such a connotation in advance. *On the contrary [...] the main purpose of the writer is to emphasize certain oft-neglected matters that may aid in the understanding and in the solution of practical, everyday problems of the law*" (Hohfeld 1913, 20: emphasis added). If his objective is kept in mind, it becomes quite clear why he can be properly enrolled among the ranks of the realists. In this connection, legal historian Morton J. Horwitz has emphasized the policy implication of Hohfeld's lesson, pointing out that his jurisprudence "contributed to the subversion of absolute property rights and substituted a vision of property as a social creation" (Horwitz 1992, 154). Hohfeld in fact applied his taxonomic scheme to a range of legal relations, including the rights in *rem* traditionally conceived as property rights to "things." Analytically conceptualized, Hohfeld insisted, rights in *rem* were not rights to physical objects but, rather, rights against persons: any right over a tangible object entails a duty owed by someone else to the right-holder which the state will enforce. Thus, in the example provided by Hohfeld (1917), the owner of a fee simple in land, holds not a simple and unitary right, but a composite bundle of rights, privileges, powers, and immunities: the right to ensure that others (duty-holders) do not enter the land or cause physical harm to it; a range of privileges, such as to occupy the land or harm it, subject only to any restriction imposed by public authority; the power to alienate some or all of his legal interests in the land to others; and a number of immunities from any attempts to change his legal capacities in relation to it without his consent.⁶ This conceptualization of property, Fried observes, had very radical consequences, for it implied that rights in *rem* "establish not vertical relationship between people and things [...] [but] a series of horizontal relationships among people, in which each capacity in the owner's entire bundle of rights imposed a correlative incapacity on non-owners." (Fried 1998, 52-53).⁷ Such a "vision" of property as a social construct, as we will show in the following sections, was consistent with – and supportive to – the institutionalists' reformist effort to adjust the private property legal regime to the social and economic changes associated with the rise of large-scale industrial enterprise.

⁶ Hohfeld did not use the expression "bundle of rights" to describe property. But his theory of jural opposites and correlatives, together with his effort to reduce *in rem* rights to clusters of *in personam* rights, provided the intellectual justification for this metaphor, which became popular among the legal realists in the 1920s and 1930s.

⁷ It should be noted, however, that Hohfeld did recognize that rights in *rem* and rights in *personam* differ from each other – albeit not ontologically. The difference lay in the fact that rights in *rem* always exist as bundles of fundamentally similar rights in *personam*. In order to make his point more forcefully, Hohfeld introduced a distinction between "paucital" rights (or "relations in *personam*") and "multital" rights (or "relations in *rem*"). Hohfeld defined a paucital right, as "a unique right residing in a person (or group of persons) and availing against a single person (or single group of persons); or else it is one of the few fundamentally similar, yet separate, rights availing respectively against a few definite persons." (1917, 718). He defined a multital right, as "one of a large class of fundamentally similar yet separate rights, actual and potential, residing in a single person (or single group of persons) but availing respectively against persons constituting a very large and indefinite class of people." (1917, 718). As an example of a paucital right Hohfeld cited the case of an ordinary bilateral contract: "If B owes A a thousand dollars, A has an affirmative right in *personam*, or paucital right, that B shall do what is necessary to transfer to A the legal ownership of that amount of money." As an example of a multital right, he cited the case of ordinary ownership of land: "If A owns and occupies Whiteacre, not only B but also a great many other persons – not necessarily all persons – are under a duty, e.g., not to enter on A's land. A's right against B is a multital right, or right in *rem*, for it is simply one of A's class of similar, though separate, rights, actual and potential, against very many persons." (1917, 719).

John Rogers Commons

Our discussion begins with John Rogers Commons, the economist who stands as the central figure in the development of the institutional approach to law and economics, and whose work reflects most clearly the mark of Hohfeld's influence.⁸ Commons' first explicit and articulate discussion of Hohfeld's schema of jural relations appeared in 1924, within the pages of his *Legal Foundations of Capitalism*. On the one hand, Commons believed that Hohfeld's analysis of complex legal positions through his fundamental legal conceptions would enable the social scientist to make accurate generalizations about the behavioral organization of any kind of "going concern" (Commons 1924, 91; see also 1925). On the other hand, Commons suggested a different interpretation of Hohfeld, whereby each set of jural relation would be interpreted as being mutually limiting, rather than logically contradicting. Accordingly, the defendant's liberties would become the limits imposed on the plaintiff's duties, and *vice versa*: "[...] duty and liberty vary inversely to each other, the duty increasing as the liberty diminishes, and the duty diminishing as the liberty (or privilege) increases" (Commons 1924, 96). The emphasis is now placed on the quantitative/limiting aspect of behavior involved in each jural relation, rather than in the logical consistency of its internal relational structure. In addition, on a purely terminological ground, Commons adopted the word "liberty" whereas Hohfeld used "privilege." Commons pointed out that, as a general legal opposite of duty, the expression liberty is to be preferred, since the term privilege is used in law to refer to those situations where the existence of a duty which is present in the standard case is negated by a particular legal defense or unique circumstance.⁹ Finally, consistently with his "limiting" interpretation of jural opposites, Commons substituted the quantitative term "exposure" for Hohfeld's "no-right."

So far, these linguistic changes do not signal any substantial conceptual departure from Hohfeld's approach. However, as will appear more evident below, they can be considered as a first step towards Commons' main intent, namely, the reframing of Hohfeld's system of jural relations within his own transactional economics framework. Commons introduced and defined the term "transaction" in chapter IV of his *Legal Foundations of Capitalism* – the same chapter which contains the discussion of Hohfeld. Evidently, we may reasonably conjecture, Commons considered the two topics to be epistemologically related. Commons conceives the transaction to be the fundamental unit of social organization and to involve the transference of some form of legal rights. According to Commons:

"A transaction, then, involving a minimum of five persons, and not an isolated individual, *nor even only two individuals*, is the ultimate units of economics, ethics and law. It is the ultimate but complex relationship, the social electrolysis, that makes possible the choice of opportunities, the exercise of power and the association of men into families, clans, nations, business, unions and other going concern. The social unit is not an individual seeking his own pleasure: it is five individuals doing something to each other within the limits of working rules laid down by those who determine how disputes shall be decided" (Commons 1924, 68-69: emphasis added).

Thus, a jural relation – rather than a bi-lateral relationship as suggested by Hohfeld – in Commons' view becomes a multi-lateral form of relationship¹⁰ with five parties involved: the buyer (B) and seller (S) who are actually engaged in the transaction, the next best alternatives for each (B' and S'), and the state or its representatives.¹¹ Interestingly, Commons pointed out a parallel between the inclusion among the participants to a transaction of the best two potential opportunities available (B' and S'), and the "Austrian"

⁸ This section on Commons draw on Fiorito (2010). For a general appraisal of Commons' institutionalism see among others, Biddle (1990), Hodgson (2003), Ramstad (1990), and Rutherford (1983). See also the two classic review articles by Wesley Clair Mitchell (1924; 1935) of Commons' *Legal Foundations of Capitalism* (1924) and *Institutional Economics* (1934).

⁹ Such as the privilege of a witness not to answer or incriminate himself is the negation of the standard duty of witnesses to testify when called or subpoenaed.

¹⁰ Cfr. Vatiero (2010).

¹¹ "[T]he five parts necessary to the concept of a right are: the first party who claims the right; the second party with whom the transaction occurs; the 'third' parties, of whom one is the rival or competitor of the first party, the other is the rival or competitor of the second party; and the fifth party who lays down the rules of the concern of which each is an authorized member." (Commons 1924, 88).

conception of opportunity cost, as the sacrifice forgone by choosing one option over an alternative one that may be equally accessible (Commons 1924, 67)¹².

A clear divergence between the two authors' perspectives emerges by analyzing in some detail Commons' adoption and reframing of Hohfeld's system of jural relations within his transactional approach. Commons started from Hohfeld's table of correlatives, amended by the terminological changes discussed above, and transformed it into a taxonomy of transactions. Commons distinguished between "authorized" and "authoritative" transactions. Here the connection with Hohfeld's taxonomy becomes more explicit. The left side of Hohfeld's jural relations defines "authorized transactions," while the right side refers to "authoritative transactions." For the purpose of our discussion here is only important to note that authoritative transactions are hierarchical in nature, while authorized transactions are not. This does not imply that authorized transactions do not ever involve legal power, but simply that power is not "built" into the nature of the transaction (Commons 1924, 107).

Authorized transactions		
Correlatives		
Limits	Right	Duty
	Exposure	Liberty

Table 3: adapted from Commons (1924).

Authoritative transactions		
Correlatives		
Limits	Official	Citizen
	Immunity	Disability
	Liability	Power

Table 4: adapted from Commons (1924).

The main departure from Hohfeld's original schema lies in the fact that Commons reinterpreted the right side of the correlatives as jural relationships between citizens and government officials who are responsible for enforcing the transaction. According to Commons' table of authoritative transactions, the citizen's power to have his right enforced by law is correlative to the official's liability to perform the enforcement; this liability, or responsibility, finds its limit in the official's immunity from being called into action, which, in turn, is correlative to the citizen's disability to have her/his claims enforced by the official authority.

The last step for Commons was to "merge" the two kind of transactions, and to redefine the enforcement process so to include also the relationships between officials.

Limits and reciprocals	Correlatives and equivalents			
	Official	Citizen	Citizen	Official
	Power	Right (Power)	Duty (Liability)	Liability
	Disability	Exposure (Disability)	Liberty (Immunity)	Immunity

Table 5: adapted from Commons (1924).

¹² The Austrian influence on Commons is particularly manifest in his early *The Distribution of Wealth* (1893), where, as its author wrote in a later reappraisal, "I tried to mix things that will not mix – the hedonic psychology of Böhm-Bawerk, and the legal rights and social relations which he had himself analyzed and then excluded from his great work on the psychological theory of value." (Commons 1924, xxxv).

Commons illustrates the jural relations involved in table 6 as follows:

“Official immunity is the *limit* of official liability, and this is correlative and equal to the disability of other officials in the exercise of power to hold this official responsible. This disability of officials is therefore equivalent to a disability of the citizen to require officials to protect his rights, and hence is identical with his exposure, which now we find to be none other than the limit of his legal capacity, or power, where begins his legal inability, incapacity, incapability, in short, his disability. This, in turn, is the exactly equal immunity of officials which now becomes the equivalent immunity of citizens, identical with their liberty, which in turn is the limit of their duties.” (Commons 1924, 113).

By recognizing that the determination of legal rights depends on the enforcement of duties of noninterference, Commons is still on the Hohfeldian track, but with an important element of novelty. Commons made explicit the role of the enforcing authority in structuring transactions, and subjected its relationships with the citizens to the same logic that governs jural relationships. Using Hohfeld’s own conceptual apparatus, Commons showed that the plaintiff is in the position of legal constrainer only because of her or his power to take legal action in a court of law. Any constraint she or he can impose is via judicial holding against the defendant.

In *Institutional Economics* (1934) Commons reiterated his intellectual debt to Hohfeld’s analysis of jural relations and persisted to adhere to his broad transactional approach as outlined in 1924. Nonetheless, Commons introduced a few important element of novelty. First of all, Commons abandoned, albeit only partially, the distinction between authorized and authoritative transactions and introduced his well known tripartite classification into bargaining, managing, and rationing transactions.¹³ The second, and more relevant to our discussion, aspect of novelty is that Commons reframed the relationships implied by his transactional analysis into what he termed the “formula of economic and social relations,” which is reproduced below:

Formula of Economic and Social Relations								
Collective Action	Working Rule	Economic Status	Social Relation	Transactions	Social Relation	Economic Status	Working Rule	Collective Action
Power	Can	Security	Right	Bargaining Managing	Duty	Conformity	Must, Must not	Liability
Disability	Cannot	Exposure	No-Right	Rationing of economic quantities	No-Duty	Liberty	May	Immunity
Immunity	May	Liberty	No-Duty		No-Right	Exposure	Cannot	Disability
Liability	Must, Must not	Conformity	Duty		Right	Security	Can	Power

Table 6: adapted from Commons (1934)¹⁴

Commons maintained the left side of Hohfeld’s original table of jural correlatives in order to establish the “social relations” stated in terms of right, duty, no-right, and no-duty. The right side of Hohfeld’s table – the one involving “power” – now defines the forms of “Collective Action” which, in turn, describe the individual’s position with respect to the going concern’s enforcing authority. Each “social relation” is also linked to a correlative “working rule,” enforced by collective action, and expressed in behavioral terms: can, cannot, may, must and must not. Finally, Commons adds a further column, which indicate what he defines as the “economic status” defined in terms of expectations associated to each social relation. For instance, a right – enforced by the power to call upon collective action – establish “security” of expectation for the individual who has that right, and correlatively, impose “conformity” to those expectations by the other participants to the transactions (who are under a duty). If the enforcing

¹³ Commons’ taxonomy of transactions is quite familiar to modern readers and needs no further comment here.

¹⁴ A closer look at table 7 would reveal some further terminological changes made by Commons. The correlative of “no-right” (Hohfeld’s privilege) is now “no-duty,” while in 1924 he used the term “liberty”. In the 1934 table, “liberty” denotes the “economic status” associated with “immunity” from collective action.

authority confers the individual immunity from collective action, then this individual possesses the “liberty” to pursue certain courses of actions, while the other participants are “exposed” to the consequences of the exercise of that liberty (i.e., are under a “disability” to call upon the enforcing authority).

Commons’ universal formula of Economic and Social relations still shows the general influence of Hohfeld’s table of jural relations. If compared to the taxonomic structure of the *Legal Foundations*, however, this influence appears somewhat mitigated. We have already pointed out that Commons’ purposes in amending the Hohfeld’s system was to make explicit and provide a system for describing the role of the state in every transaction. By formally connecting the specific social relation of the individual (and his “economic status”) to the collective action of the enforcing authority, Commons was now trying to be more explicit in reframing Hohfeld’s analysis as a “formula” that facilitates thinking about how the state has in the past and can in the future promote certain private purposes – which when promoted and enforced by the state become public purposes – through its role in creating and altering the limits within which each transaction takes place.¹⁵

Robert Lee Hale

Robert Lee Hale’s contribution to law and economics is generally described as an intellectual bridge between the traditions of legal realism and institutionalism (Samuels 1973; Duxbury 1990; Fried 1998)¹⁶. Hale’s ties with realism are revealed by his continuous effort to understand legal rules in terms of their social consequences, and by his belief that this knowledge could be “instrumentally” used to achieve efficiency and social justice. As far as his connections with institutionalism are concerned, Fried has correctly observed that “Hale’s push to expose the legal underpinnings of the market can be seen as part of the larger project of the institutionalists to understand the social institutions that condition economic life.” (Fried 1998, 5). This is especially reflected in Hale’s attack on the normative implications of “neoclassical” economic theory, and in his reiterated contention that mere a priori arguments on free market’s superiority *vis-a-vis* redistributive regulation could not withstand scrutiny.

It goes without saying that a complete assessment of Hale’s contribution to institutionalist legal economics is well beyond the scope of this brief section. Hale’s work will be reviewed here to the extent it sheds light on the primary focus this paper. There are two specific tenets of Hale’s general system of thought which best allow us to evaluate his intellectual connections to Hohfeld. The first one is Hale’s lifelong contention that the free market economy, like all economic economies, is in fact a system of “coercive” power. In his celebrated essay on “Coercion and Distribution in a Supposedly Non-Coercive State” (1923) Hale drew a fundamental distinction between what he defined as “voluntary” and “volitional” freedom; the former signifying complete autonomy with no constraints on choice, the latter a circumstantially limited exercise of choice. Every market transaction, Hale continued, involves almost invariably volitional freedom because of the existence of several “coercive constraints” placed on behavior. Some of these constraints stem from the working rules governing bargaining conduct – such as formal and informal norms prescribing or prohibiting certain kinds of conduct. According to Hale, however, the most important coercive constraints are those arising out of property rights. Property rights, in fact, give the holder the crucial power to exclude and withhold, enabling him to determine whether or not the use of things by other individuals is lawful and to impose terms on them as the price of making it so. As noted by Gregory S. Alexander (1997, 335), Hale conceived the basic functions of property rights as *offensive*, rather than *defensive*: “not a means to protect oneself from unwanted interferences from others or the state, but the basis for coercing others to do something that the owner wishes.” In his 1922 article on “Rate Making and the Revision of the Property Concept” Hale heavily drew on Hohfeldian analysis in order to explain such a coercive role of ownership:

¹⁵ On this specific issue see the enlightening discussions in Biddle (1990) and Ramstad (1990).

¹⁶ Robert Lee Hale received his LLB from Harvard University in 1909 and his Ph.D. in economics from Columbia University in 1918. Hale initially held a joint appointment in the economics department and the law school at Columbia University and then moved to the law school on a full-time basis in 1928. Joint seminars in law and economics were taught at Columbia, involving Hale, Clark and the leading Realist Carl Llewellyn.

“The right of ownership in a manufacturing plant is, to use Hohfeld’s terms, a privilege to operate the plant, plus a privilege not to operate it, plus a right to keep others from operating it, plus a power to acquire all the rights of ownership in the products. The analysis is not meant to be exhaustive. Having exercised his power to acquire ownership of the products, the owner has a privilege to use them, plus a much more significant right to keep others from using them, plus a power to change the duty thereby implied in the others, into a privilege coupled with rights. This power is a power to release a pressure which the law of property exerts on the liberty of the others. If the pressure is great, the owner may be able to compel the others to pay him a big price for their release; if the pressure is slight, he can collect but a small income from his ownership. In either case, he is paid for releasing a pressure exerted by the government—the law. The law has delegated to him a discretionary power over the rights and duties of others.” (Hale 1922, 214).

It should be pointed out that Hale drew no normative implications from such a pervasiveness of coercive power. As he put it, “to call an act coercive is not by any means to condemn it. It is because the word ‘coercion’ frequently seems to carry with it the stigma of impropriety, that the coercive character of so many innocent acts is so frequently denied.” (Hale 1923, 471). For Hale coercion is inherently and inevitably built in the relational structure of any transaction. This conception is reflected in his use of Hohfeld’s analytical apparatus. Hale’s adoption of the Hohfeldian framework was in fact instrumental to show that all markets are characterized by a “structure of mutual coercion,” a structure which is mainly “a reflection of the particular legal rights with which the law endows [some], and the legal restrictions which it places on others.” (Hale 1943, 625). As noted by Warren J. Samuels:

“Hale conception of the economy as a system of mutual coercion and his understanding of the legal bases thereof may be related directly to Hohfeld’s paradigm of fundamental legal relations, for those relations, like the relations in Hale’s paradigm, represent a structure of legally grounded private economic power with asymmetrical elements and with the legal system partially responsible for that asymmetry. For, differential coercive power is a partial function of the fact, in Hale’s view, that there is an unequal distribution of effective *rights, privileges, powers, immunities, duties, no-rights, liabilities, and disabilities*. What is relevant at this point, however, is that the system of mutual coercion embodied, albeit latently or implicitly in Hohfeld’s paradigm is also embodied, but explicitly, in Hale’s.” (Samuels 1973, 274-275: emphases in original).

But Hale’s intellectual connection with Hohfeld surfaces also in his notion of “liberty” and in his related criticism of the “liberal” assertion that less state interference in private economic affairs necessarily implied more freedom for its citizens. Hale developed at length this theme (which is Hale’s second tenet under scrutiny here) in several articles during the twenties (see especially Hale 1923; Hale, Hollander, and Lewisohn 1923) and in his epistolary exchanges with some of the leading figures of the time¹⁷. In this connection, Hale’s unpublished correspondence with Arthur T. Hadley is particularly enlightening. The exchange between the two men was triggered by the publication in the *Yale Law Review* of Hadley’s review of *Liberty under Law* by William Howard Taft (1923). Hale’s attention was captured by a single passage where Hadley, the positive tone of the review notwithstanding, could not help lamenting that “he [Tafts] gives so few words to the specific political danger from which America finds it hardest to protect herself—the passion for enforced equality at the expense of personal liberty, which now dominates large groups of citizens who are very far removed from being Bolsheviks. *As long as people care more for liberty than they do for equality, we have little to fear from any form of democracy.*” (Hadley: emphasis added). To Hale’s eyes, Hadley’s antithesis between liberty and equality clearly epitomized the “orthodox” view that the market was the realm of freedom, and the government the realm of coercion. “My ‘thesis’” – he rejoined – “is that liberty needs more defining before we can say that private ownership is consistent with it, and

¹⁷ See Samuels (1984) for the correspondence between Hale and Thomas Nixon Carver. Hale also corresponded with Commons on a regular basis. For Hale and Commons’ correspondence, see Hale papers, folders 10 and 28, Rare Book and Manuscript Library, Columbia University.

when so defined, the necessary inconsistency between 'liberty' and paternal legislation ceases to exist."¹⁸ Hale fully articulated his position in a following letter which is reproduced below at full length in its crucial passages:

"I quite agree with you about the use of Hohfeld's terminology, with the reservation that I doubt whether the word 'liberty' in the 14th Amendment should be used in the same sense of his 'privilege' or 'liberty' ...¹⁹ If 'personal liberty' means Hohfeld's 'privilege,' i.e., absence of legal duty, absence of governmental restraint on what persons may do—then those who uphold the existing institution of property without equalizing qualifications care more for a particular scheme of compulsory inequality than for personal liberty in that sense. For the correlative of the right to own is a duty of everyone else to desist from acting in certain ways regarding the thing owned. This duty, like all legal duties, is of course a curtailment pro tanto of personal liberty to act. And it is not a curtailment which promotes the personal liberty of the owners in the same sense of removing a legal restriction on their conduct. The 'liberty' of the owners which the right of ownership promotes is either (1) an absence of a factual inhibition on the handling of the thing owned—an inhibition which the promiscuous use of the thing by others would involve, or (2) an absence of those factual inhibitions on conduct which accompany a limitation of income, since the ownership makes possible the collection of income. The institution of ownership may also promote (3) a factual 'liberty' of the last mentioned kind in the non-owners by stimulating the production of goods, hence indirectly enlarging the real income of the non-owners.

If personal liberty means none of these three, but only absence of governmental restraints, any equalizing scheme (for instance price reduction) does indeed curtail the liberty to ask what price one chooses, but it imposes no more of a governmental restraint on the owners than the system of ownership itself imposes on the non-owners. If we talk merely in terms of absence of governmental restraint, the advocates of the equalizing scheme might say they were merely proposing that when the personal liberty of the non-owners is curtailed by rights accorded to owners, the curtailment of the non-owners' liberty should be compensated by attaching to the owners' rights certain reciprocal legal duties to the non-owners. I.e., while the equalizing scheme curtails liberty, it curtails the liberty of those on whose behalf the liberty of the non-owners has already been curtailed.

On the other hand, if personal liberty means the absence of any restraint, governmental or other, on personal conduct, then the equalizing scheme will curtail the liberty of the owners (in this factual sense), but it may or may not enlarge the factual liberty of the non-owners. If the scheme so greatly impairs the incentive to produce that the non-owners themselves will have less factual freedom from the shackles of poverty (less absolute real wealth), then in that case I admit you would be right in saying that one who advocates the scheme care less for (factual) personal freedom than for compulsory equality. If on the other hand the particular scheme impairs the incentives not at all, or so little as to leave the non-owners still better off than before the equalization, then the scheme will enlarge the factual freedom of the non owners in exactly the same manner as that in which it will curtail the factual freedom of the owners—namely, by removing some of the limitations on the real income of the former, and putting further limitations on that of the latter. That is what I meant by saying that (when incentive is not impaired) the question raised by any proposed equalizing scheme 'is a question of liberty against liberty, not of liberty against equality.' (p. 54 of my shorter article [Hale, Hollander, and Lewisohn 1923]). I meant to make no further implication as to which liberty should be preferred."²⁰

¹⁸ Hale to Hadley, November 9, 1923. Hale Papers: Rare Book and Manuscripts Library, Columbia University.

¹⁹ "I was myself rather slow in accepting Hohfeld's ideas, but as I have become accustomed to them I am greatly impressed with the amount of confusion which is cleaned up by the constant use of his terms as he define them." Hadley to Hale, November 12, 1923, Hale Papers: Rare Book and Manuscripts Library, Columbia University.

²⁰ Hale to Hadley, November 24, 1923. Hale Papers: Rare Book and Manuscripts Library, Columbia University.

Hale's main contention can be summed up as follows. He argued that apologists of laissez faire like Hadley could maintain that government held a monopoly on the legitimate use of coercion only because they conceived "liberty" as synonymous with Hohfeld's "privilege," — i.e. "absence of legal duty, absence of governmental restraint on what persons may do," as he wrote in his letter. But in so doing, they missed the pervasiveness of coercion also in the private sphere — in a form indistinguishable in essence from governmental coercion. "Private" market transactions, Hale argued, are in fact coerced by the common-law rights of property owners to withhold their property (including their labor), respectively, except on such terms of exchanges they had demanded. This in turn implied that in intervening in private transactions to limit one side's right to dictate the terms of exchange, the government is indeed constraining that side liberty, as Hadley had argued. But it is simultaneously enlarging the sphere of choices of the other side.

Here, as Ian Ayres has acutely observed, the crucial consequence that Hale drew from Hohfeld's system of jural relations is that the total amount of "negative" freedom, that is, freedom from coercion, must necessarily remain constant across different possible legal regimes (Ayres 1999, 51-54). Since rights, privileges and powers always impose (through the agency of the state) correlative restraints on others, any redistributive expansion of one person's freedom of choice necessarily implies the restriction of other people's options. Fried clarifies this point as follows: "[t]hat reality meant that when the government intervened in private market relations to curb the use of certain private bargaining power, it did not inject coercion for the first time into those relations. Rather, it merely changed the relative distribution of coercive power." (Fried 1998, 18). As a consequence, as Hale wrote to Hadley, the choice among different legal regimes "is a question of liberty against liberty, not of liberty against equality." But which is the standard according to which policy makers should choose among these different liberty schemes? Hale ventured a tentative answer to such question, one that was consistent with the institutionalist reformist agenda of the 1920s and 1930s: rights should be assigned as to maximize real "factual" freedom enjoyed by society as a whole. By "factual freedom" Hale meant total wealth available to society as a whole. Hale made explicit his "materialistic" conception of factual freedom in a 1923 address:

"One impersonal, or environmental circumstance, which restrains the free power of choice and which impairs the interest in self-assertion (the interest which Pound sees as the vital thing underlying personal liberty), is a scarcity of wealth in the community. This scarcity will be relieved by greater production. Many of the incomes which owners get by virtue of their property rights probably constitute one of the great incentives to production. It is only insofar as private ownership does stimulate production that private ownership, unevenly distributed as it now is, can be said to promote the freedom of any but a minority. Either it curtails liberty, or it promotes liberty in the sense of freedom from impersonal environmental obstructions." (Hale, Hollander, and Lewisohn 1923, 53).

The only viable line of conduct to enlarge factual liberty, Hale argued, was to increase the options available to the non-owners, subject only to preserving adequate incentives for the other members of society to be at least equally productive. On the one hand, in fact, Hale did not deny that property rights and discrepancies in wealth distribution may work as potential mechanism for stimulating productive activity. He admitted: "[y]et there is a large element of truth in the proposition that many of the inequalities of income serve the useful function of stimulating production in such a way as to benefit others as well as the producers. And some inequalities might be defended on other grounds—for instance, on the ground that their removal would cause serious temporary dislocations." (1923, 482). On the other hand, however, Hale cautioned that this might not always be the case. Following Hobhouse (1913), Hale made a crucial distinction between property-for-use and property-for-power. He clearly illustrated this point in his letter to Hadley reproduced above. There he affirmed: "The 'liberty' of the owners which the right of ownership promotes is either (1) an absence of a factual inhibition on the handling of the thing owned—an inhibition which the promiscuous use of the thing by others would involve, or (2) an absence of those factual inhibitions on conduct which accompany a limitation of income, since the ownership makes possible

the collection of income.”²¹ In the latter case, the function of property rights is not to promote the interests of individuals in the personal use of their property, but rather to redistribute coercion in the system, enhancing their bargaining power in a transaction and their claim on an income from the community.

In conclusion, Hale’s writings on legal economics during the 1920s and the early 1930s clearly show the mark of Hohfeld’s legal relations framework. This framework is, nonetheless, adopted not as a comprehensively applicable analytical tool as in Commons, but mostly in a “rhetorical” fashion – i.e., as a means of explicating particular points of argumentation. For Hale, at a general level, Hohfeld’s lesson was instrumental to show that the critical question for policy makers was not whether to back freedom or coercion, the “market” or the “state,” but rather which structures of rights, coercion, and volitional freedom to adopt in a particular institutional context.

John Maurice Clark

John Maurice Clark was one of the leading figures of American institutionalism during the wars but his intellectual influence went well beyond the perimeter of the movement. His interests were quite eclectic in nature, spanning from applied micro and macroeconomics, to issues relating to economic methodology and epistemology (Shute 1997). Clark’s most comprehensive analysis of legal-economic problems appeared in two essays published in 1925 on the *University Journal of Business* (Clark 1925a; 1925b). The following year both pieces were reproduced, with only slight modifications, as chapters VI, VII and VIII of his *Social Control of Business* (1926)²². Albeit Clark refers to Hohfeld just once and in a footnote, the general Hohfeldian tone of his discussion is quite evident throughout the text and did not escape the attention of legal scholar Nathan Isaacs who, in his review of the second edition of *Social Control of Business*, critically remarked: “Unfortunately, Professor Clark takes his law too readily from writers on jurisprudence... particularly Hohfeld. The Hohfeldian scheme of dividing every legal situation into component rights, privileges, powers and immunities, duties, ‘no-rights,’ liabilities and disabilities, was very much more in vogue in 1925 than it is today” (Isaacs 1940, 275-76)²³.

Clark’s discussion of legal processes was instrumental to his own “social control” agenda for the reorganization of the market in the interest of social welfare and democracy. It should be noted that Clark concerned himself not, specifically, with the notion of economic intervention but, more generally, with the use of social disciplines such as economics and law to facilitate social control. Interestingly, Clark begins with a definition of social control which shows the clear mark of Hale:

“‘Control’ means, primarily, coercion: orders backed by irresistible power. In a sense, no coercion is truly irresistible, or almost none. One can always break the law if one will take the consequences—and sometimes the penalty is less than the profits of the offense. But the earmark of coercive control is penalties, imposed by a power which can, if it will, make them heavier than anyone but the most desperate would deliberately incur... But there are other and less obvious ways of exercising control. In a broad sense, you can control me if you can make me do what you want, no matter what motive you use.” (Clark 1926, 6-7)²⁴.

²¹ When the owner of things uses those things himself, Hale wrote, “the legal arrangement which restricts the liberty of the non-owners promotes an interest of a very different sort from that promoted when the owner does not himself use the things owned.” (Hale 1927, 136-7 n7).

²² Clark’s *Social Control of Business* was published in 1926 as a textbook in a series entitled “Material for the Study of Business,” edited by L. C. Marshall, as part of an “experiment” with the curriculum in Business Administration at the University of Chicago.

²³ In addition to Hohfeld’s Yale Law Journal articles, Clark’s refers to Commons’ *Legal Foundations of Capitalism* where, he writes, “this method of analysis [Hohfeld’s] is used at length” (Clark 1926, 99 n1). Commons (1927) favorably reviewed Clark’s *Social Control of Business*.

²⁴ Accordingly, Clark refers to Hale (1923). In 1926 Hale wrote Clark praising his recent works: “I have just been reading this summer your ‘Overhead Costs’ (1924) and then your ‘Social Control.’ While the reading was not always easy (particularly in the ‘Overhead Costs’), it was a real delight. So many even of the able writers seem capable at times of slipping into fallacies so obvious as only to need pointing out, that it is a pleasure to find reasoning so sure-footed as yours. Your chapters in ‘Social Control’ on fair value have pleased me as much as anything I have read on the subject.”

Clark continued observing that “in order to learn the real meaning of rights as instruments of control, we must look at the duties and prohibitions which they involve.” (Clark 1926, 103-4). Accordingly, his following step was to combine such a “coercive” conception of social control with Hohfeld’s analysis of jural relations. The passages reproduced below clearly show Clark’s intellectual debt to Hohfeld:

“Property and contracts are rights, or bundle of rights, but they turn out on examination to be rather complex relationships between a number of parties, involving an assortment of duties, liabilities, powers, and immunities, which require a high degree of discrimination to unravel.” (Clark 1926, 98).

“Every right implies a two-sided relationship in which one party owes the other a duty and the other part benefits thereby. This relationship, viewed from the standpoint of the beneficiary, is a right in the strict sense. I have rights only so far as other people have duties toward me... So far as people have no duties toward me or anyone else, they are free: liberty begins where duty ends, and *vice versa*. Which means that my rights set the boundaries upon others’ liberties.” (Clark 1926, 99).

The second passage quoted above may convey the idea that Clark is closely following Hohfeld in his strictly “bilateral” conception of a jural relation. Such an interpretation, however, would be misleading. Clark exemplified the stylized facts of a legal relation with the aid of two diagrammatic charts – here reproduced as figure 1 and 2. The first diagram illustrates Clark’s version of a transaction involving the transfer of property rights: A is the individual transferring the legal right and B is the recipient; while O is the governmental officer and P is the general public. As shown in the diagram, A’s receipt of property from B, is insured by A’s contractual right against B, which, in turn, is enforced by A’s right of action against B, via O, in case of B’s default. Each of these relations has a specific correlative expressed in Hohfeldian terms. A’s power to call on governmental officials to enforce his legal claim, for instance, is correlative to B’s liability to enforcement of his contractual duty to A. The general resemblance of this scheme with Commons’ transactional approach is quite evident and needs no particular comment.²⁵

FIGURE 1

More interesting is Clark’s second chart, which represents the legal implications of private property once the transfer of rights has taken place. Here Clark adopted the Hohfeldian analysis in order to unveil the complex and relational character of ownership. Specifically, Clark’s intent was to illustrate that ownership is not that simple and non-social relationship between a person and a physical object that Blackstone’s description suggested. “The acquisition of property” – Clark affirms in this connection – “is not a right [...] but a liberty, and it is a liberty of the most exposed sort, because it depends on the positive co-operation of other individuals who are under no definite obligation to do anything at all.” Clark continues as follows:

“Once a person has acquired property, he has rights in it, but he has no right to acquire it in the strict sense. Evidently one of the very delicate questions in the economic functions of law centers in the degree of protection given to some of these exposed liberties on which the acquisition of property depends. This is an especially delicate matter, because such liberties cannot be protected except at the expenses of other liberties. We cannot protect the worker’s liberty to get

Robert Lee Hale to John Maurice Clark: August 10, 1926, John Maurice Clark Papers, Rare Book and Manuscript Library, Columbia University.

²⁵ In a letter to Clark, Emerson P. Schmidt – a former student of Commons – wrote: “I notice that you drew to a considerable extent on the work of Commons in his Legal Foundations. I had his course on this problem and so enjoy your statement of many of his concepts which in many cases is a clearer statement than his.” Emerson P. Schmidt to John Maurice Clark: April 14, 1926. John M. Clark Papers, Rare Book and Manuscript Library, Columbia University.

and keep a job without restricting the employer's liberty to refuse to hire men, or to lay them off after he has hired them. We may also have to restrict the liberty of other workers to take the job away. Or we cannot protect the consumer's liberty to acquire goods without limiting the producer's liberty to limit production or to refuse to produce. Liberties must be balanced against liberties, and there is no absolute standard by which a correct balance can be determined with mathematical accuracy." (Clark 1926, 104-05).

Such a pervasive relational character of private property is graphically represented in figure 2.

FIGURE 2

As shown in the diagram, A's use of his property is protected by A's rights of non interference against P in the use of that property, which in turn are enforced both by government's (potential) intervention and by A's self protection by threatening or applying violence. As Clark himself affirmed, "[o]ne of the very interesting features of this scheme of relations here crudely outlined [chart II] is the liberty the owner enjoys of protecting his property himself if he can" (Clark 1926, 102).

In more general terms, the substantive insight that Clark drew from Hohfeld's lesson was that the fact that a person has a *privilege* (in Hohfeld's terminology) to do something says nothing about whether that person has a legal right with respect to that action, in the sense that that person has a power to summon state intervention to oppose another's interference with that action.²⁶ Clark illustrates the point as follows:

"But to have a liberty one needs something more than mere absence of duty. If others are free to interfere, one's liberty may become well-nigh useless, and hence it must be protected by rights to non-interference on the part of other people. In commons speech no distinction is made between these rights and the liberty which they protect, and such protected liberties are commonly called 'rights.' In fact, most of the so called 'rights' of an individualistic economy are really protected liberties, and the duties they involve are summed up in the general negative duty of non-interference. When a person speaks of a right to do something, as distinct from a right to keep or to receive, he is nearly always speaking of a liberty" (Clark 1926, 99).

To put it differently, people have claims, and claims are rights of the Hohfeldian sort, i.e. they are correlative with duties. People also have privileges, and a privilege imposes on others what Hohfeld called a no-tight, that is, a denial of access to state power to prevent the privileged action. But more importantly, as far as economic processes are concerned, people have liberties, and liberties are not themselves privileges: the liberty to do this or that includes privileges of doing it, and claims to non interference with doing it. "Positive" liberties such as private property, this was Clark's main contention, are cluster of rights and are themselves rights.

A Digression: dissenting views on Hohfeld

So far, our discussion has been directed to show the existence of a loosely defined research programme on legal economics within institutionalism and its, more or less directly traceable, Hohfeldian roots. As observed in the introduction however, one of the main characteristics of American institutionalism as an intellectual movement, was its irreducible pluralism which resulted in the coexistence of different, and sometimes even divergent, research programmes within the perimeter of the school. In this connection, the general field of institutionalist law and economics makes no exception. Not all the

²⁶ In 1918, Cook had made the same point as follows: "Suppose A., owner and possessor of a chattel, tells B. that he may take the chattel if he can do so, but that A. will do all he can to prevent B. The permission thus given by A. to B. has as its consequence the destruction of B.'s duty to refrain from taking the chattel and confers upon him the privilege of taking it. It does not, however, give B. a right (in the strict sense) to take it, i.e., it does not place A. under a duty to let B. take it. A. accordingly commits no legal wrong in resisting B's efforts to take it." (Cook 1918, 787).

institutional economists investigating on legal issues, in fact, did accept the Hohfeldian framework as a theoretical foundation for their analyses. A few examples will illustrate the point. Walton H. Hamilton – a figure often associated with the legal realist movement (Kalman 1986) – made no reference to Hohfeld’s seminal pair of articles in his assessments of the property concept, nor he showed any particular interest in the contributions of Commons, Hale and Clark.²⁷ Not surprisingly, in a later contribution (1941, 20), Hamilton dismissed Hohfeld as a “reminder that many rational beings believe that ultimate truths can be reduced to patterns on a blackboard.” Similarly, Lawrence Kelso Frank’s 1924 essay on “An Institutional Analysis of the Law” published in the *Columbia Law Review*, was phrased in a strictly behavioristic jargon and showed no influence whatsoever of Hohfeld or other authors of the Hohfeldian school.²⁸

In the case of James Bonbright, then, the skepticism towards the Hohfeldian framework of jural relations was expressed in far more explicit and articulate terms. In 1937, Bonbright – a colleague of Clark and Hale at Columbia – published his famous *Valuation of Property*. The book, albeit mainly “practical” in character and style, contained a methodological section on “The Concept of Property as Affecting the Concept of Value.” There, Bonbright informed the reader that “throughout this chapter we use the term ‘legal rights’ broadly, to include all those favorable legal interests that Hohfeld has analyzed into rights, powers, privileges, and immunities.” From the standpoint of property valuation, however, “Hohfeld’s concepts have only a limited application, since it is seldom that one must value, say, a right devoid of a privilege, or a privilege devoid of an immunity.” (1937, 100). Bonbright defended the common-sense view that some property rights can only be understood as right to things against the Hohfeldian “bundle of rights” conception of property. Simply because such rights are protected by claims against individual people, he insisted, does not entail that their basic character is altered. Bonbright’s contention was that Hohfeld’s structure, and arguably the “bundle picture” of property, appears to be identical whether one owns a piece of land or a patent, or whether one has title to a chose in action or holds security on a debt. Intuitively, Bonbright affirmed, there are different degrees of exclusion present in these cases, and perhaps even different categories of private law claims. To this, he added a more incisive critique: Hohfeld’s bilateral structure and the bundle-of-rights approach generally do not allow any room for the non legal dimension of the interests involved in property relations. As Bonbright concluded, “[h]aving in mind this fact that the courts value many things other than actually existing legal rights as a means of settling claims arising from the infringement of these legal rights, we can readily understand why judicial valuation is not necessarily confined to a valuation of property rights. It includes valuations of all sorts of human interests or opportunities—interests, the values of which are not identical with the values of those legal rights that are designed to aid in their protection.” (1937, 104-105).

Conclusions

Leading American institutionalists such as Commons, Hale and Clark conceived Hohfeld’s analysis of legal right as providing the analytical framework for their analyses of the interrelations between legal and economic processes. Albeit with substantial differences in style, method and emphasis, they followed Hohfeld in recognizing the adversarial nature of legal rights and in arguing that such concepts as property and liberty actually represent an aggregation of numerous types of legal relations. Hohfeld’s schema provided a powerful analytical and rhetorical tool whereby these highly abstracts conceptions could be reduced to a limited number of primary elements. The motivation behind the institutionalists’ fascination with the “bundle-of-rights” approach to key legal concepts was mainly pragmatic. They sought to undermine the notion that property and liberty are natural rights, and thereby smooth the way for activist state intervention in controlling and regulating certain sectors of the economy. The institutionalists acceptance of Hohfeld, however, was not uncritical. Commons “transactional” approach, Clark’s analysis of property rights, Hale’s sophisticated notions of coercion and volitional freedom, can be in fact seen as attempts to amend Hohfeld’s strictly “bilateral” characterization of legal relations and to emphasize the role of government in shaping and directing legal processes. For Commons, Hale and Clark, in fact, the socially constructed nature of legal rights underlined the extent to which in modern capitalism markets are

²⁷ See Hamilton (1932) and Hamilton and Till (1934).

²⁸ On Frank’s contribution to institutionalism see Asso and Fiorito (2004b).

themselves in crucial respect legal and institutional constructs, the products of legal decisions by the state to create, promote and distribute Hohfeld's rights, privileges, powers, and immunities and their correlative duties, no-rights, liabilities and disabilities.

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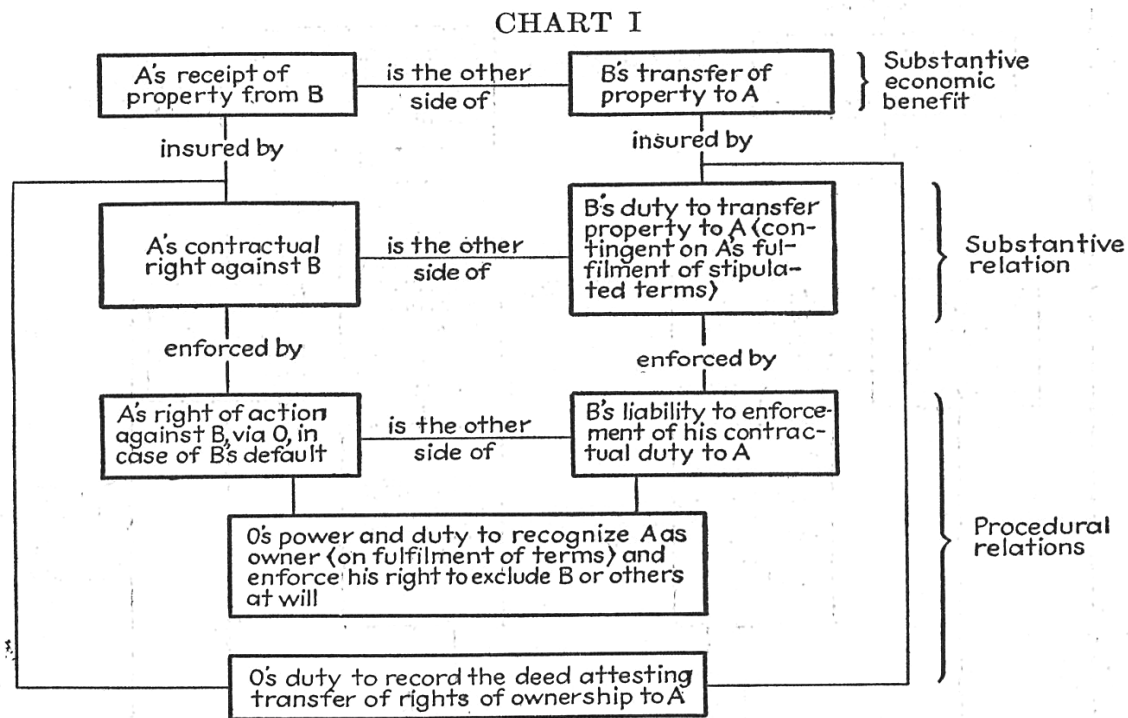


Figure 1

CHART II

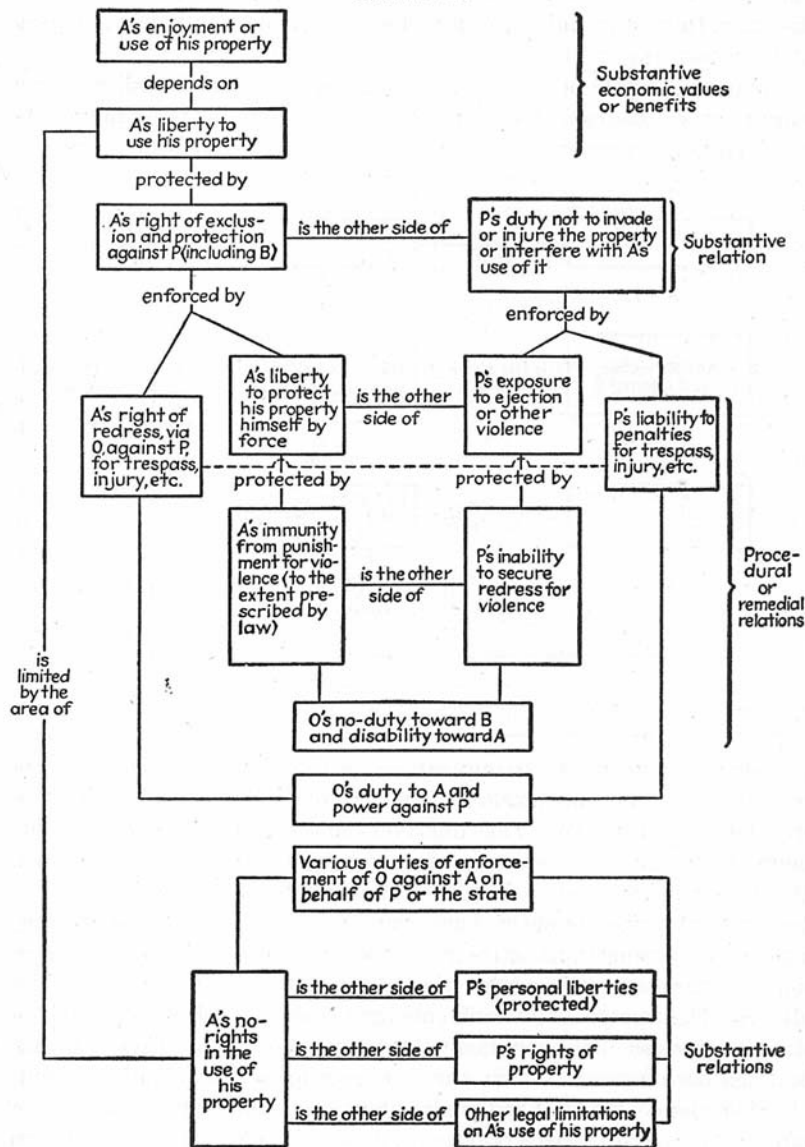


Figure 2